LOCK WEE KOCK

v.

MENTERI HAL EHWAL DALAM NEGERI & ANOR.

SUPREME COURT, PENANG
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA),
TAN SRI DATO' MOHD. EUSOFF BEST CHIN SCJ,
DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJ
[CRIMINAL APPEAL NO. 05-30-92]
30 SEPTEMBER 1993

PREVENTIVE DETENTION: Detention order issued against appellant • Whether there was non-compliance with the provisions of ss. 3(3) and 5(4) of the Dangerous Drugs (Special Preventive Measures) Act 198B • Whether non-compliance renders detention order void.

The appellant was arrested and detained by the police under s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act). The Deputy Minister of Home Affairs subsequently issued a detention order under s. 6(1) of the Act for the appellant to be detained for a period of 2 years at the Pusat Pemulihan Akhlak, Pulau Jerjak. The appellants application for a writ of *habeas corpus* was dismissed by the High Court and the appellant appealed further.

Counsel for the appellant contended that the Minister had not complied with the provisions ofss. 3(3) & 5(4) of the Act in that the Minister had not prescribed the time period for the submission of the reports by the Investigation Officer and the Inquiry Officer.

Counsel submitted that although the word "may" is used in ss. 3(3) & 5(4) of the Act, it should be treated as mandatory and the Minister must prescribe the periods by regulations under s. 22 of the Act.

Held:

[1] The Courts have always construed the words "may" and "shall" with reference to the context in which it is used. If it appears to be the settled intention of the legislature to convey the sense of compulsion, then whether the word "may" or "shall" is used, it has the mandatory effect.

[2] Parliament has fixed the time periods under s. 3(2) of the Act but has left it entirely to the Minister to fix the period within which the reports are to be submitted under ss. 3(3) & 5(4) of the Act.

[3] If the Minister fixes a time period within which the police investigating officer and the Inquiry Officer are to submit their reports and that period is insufficient, the reports may not be complete in the sense that matters which ought to be investigated or inquired into are left out. This would make it difficult for the Minister to act under s. 6(1) of the Act when deciding whether or not to make the detention order.

[4] The words "as may be prescribed by the Minister" found in both ss. 3(3) & 5(4) of the Act ought to be treated as conferring a power to prescribe, exercisable at his discretion, and not as a mandatory requirement. The fact that no period had been prescribed by the Minister within which the reports by the Investigating Officer under s. 3(3) of the Act or by the Inquiry Officer under s. 5(4) of the Act were to be submitted did not vitiate the process leading to the detention order being made by the Minister.

[Appeal dismissed].

[**Bahasa Malaysia** Translation of Headnote]

TAHANAN PENCEGAHAN: Perintah tahanan dikeluarkan terhadap perayu - Sama ada terdapat ketidakpatuhan dengan peruntukan ss. 3(3) dan 5(4) Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 - Sama ada ketidakpatuhan menyifatkan perintah tahanan sebagai terbatal.

Perayu telah ditangkap dan ditahan oleh polis di bawah s.3(l) Akta Dadah Merbahaya (Langkah-langkah Pencegahan Khas) 1985 (Aktatersebut). Timbalan Menteri Kementerian Dalam Negeri Kemudiannya telah mengeluarkan satu perintah tahanan di bawah s.6(l) Akta tersebut bagi perayu ditahan untuk selama 2 tahun di Pusat Pemulihan Akhlak, Pulau Jerejak. Permohonan perayu untuk writ habeas corpus telah ditolak oleh Mahkamah Tinggi dan perayu telah membuat rayuan lanjutan.

Peguam bagi perayu menghujahkan bahawa Menteri tidak mematuhi peruntukan ss. 3(3) & 5(4) Akta tersebut di mana Menteri tidak menetapkan tempoh masa bagi penyerahan laporan oleh Pegawai Penyiasat dan Pegawai Penyoal.

Peguam menghujahkan bahawa walaupun perkataan "mungkin (may)" digunakan dalam ss.3(3) & 5(4) Akta tersebut, ia haruslah disifatkan sebagai mandatori dan Menteri mestilah menetapkan tempoh melalui peraturan di bawah s. 22 Akta tersebut.

Diputuskan:

[1] Mahkamah selalu mentakrifkan perkataan "mungkin (may)" dan "hendaklah (shall)" dengan merujuk kepada konteks di mana kedua-duanya digunakan. Jika niat perundangan berkenaan ialah untuk menyampaikan sifat memaksa, maka sama ada perkataan "mungkin" atau "hendaklah" digunakan, ia mempunyai kesan mandatori.

[2] Parlimen telah menetapkan tempoh masa di bawah s. 3(2) Akta tersebut tetapi telah meninggalkan sepenuhnya kepada Menteri untuk menetapkan tempoh masa dalam lingkungan mana laporan-laporan berkenaan perlu diserahkan di bawah ss. 3(3) & 5(4) Akta tersebut.

[3] Jika Menteri menetapkan suatu tempoh masa di mana pegawai penyiasat polis dan pegawai penyoal patut menyerahkan laporan mereka dan jika tempoh tersebut tidak cukup, maka laporan berkenaan tidak akan siap di mana perkara-perkarayang perlu disiasat atau disoal ditinggalkan. Ini akan menyulitkan Menteri untuk bertindak di bawah s. 6(1) Akta tersebut apabila membuat keputusan sama ada atau tidak untuk membuat perintah tahanan.

[4] Perkataan "sebagaimana yang mungkin diperihalkan oleh Menteri" yang ditemui dalam kedua-dua ss. 3(3) & 5(4) Akta tersebut harus disifatkan sebagai memberikan kuasa untuk menetapkan, yang boleh diamalkan atas budibicaranya, dan bukan sebagai keperluan mandatori. Fakta bahawa tiada tempoh masa ditetapkan oleh Menteri dalam lingkungan mana laporan-laporan oleh Pegawai Penyiasat di bawah a. 5(4) Akta tersebut patut diserahkan tidak menjejaskan proses yang membawa kepada perintah tahanan dibuta oleh Menteri

[Rayuan ditolak].

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1X2X3), 5(4), 6(1), 22
Interpretation Acts 1948 and 1967
Interpretation Act, s. 37 (Barbados)

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Hamid Embong, SFC

JUDGMENT

Mohd. Eusoff bin Chin SCJ:

The appellant was arrested and detained by the police on 15 September 1990 at 2.15 p.m. at Batu Pahat under s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter, the Act). On 13 November 1990, the Deputy Minister of Home Affairs issued a detention order under s. 6(1) of the Act for the appellant to be detained at the Pusat Pemulihan Akhlak, Pulau Jerjak, for two years.

A *habeas corpus* application for the release of the appellant was filed in the Penang High Court on 29 April 1991. The High Court dismissed the application on 28 October 1991. Hence this appeal.

The only ground advanced before us is that the Minister had not complied with the provisions of s. 3(3) and s. 5(4) of the Act and the failure to comply with these provisions has rendered the detention order void. Sections 3(3) and 5(4) of the Act state:

> 3(3) The police officer making an investigation pertaining to a person arrested and detained under this section shall cause a copy of the complete report of the investigation to be submitted -
>
> (a) to an Inquiry Officer appointed under subsection (1) of s. 5; and
> (b) to the Minister,
>
> within **such period as maybe prescribed** by the Minister by regulations made under this Act.
>
> 5(4) An Inquiry Officer shall submit his report in writing to the Minister within such period **as may be prescribed** by the Minister by regulations made under this Act.
> (emphasis added)

Encik Karpal Singh the learned Counsel for the appellant submitted that although the word "may" is used in ss. 3(3) and 5(4) of the Act, it should be treated as mandatory and the Minister must prescribe the periods by regulations under s. 22 of the Act which provides:

> 22(1) The Minister **may** make regulations to carry out the purposes of this Act.
>
> (2) In particular and without prejudice to the generality of subsection (1) such regulations **may** -
> (a) ...
> (b) ...
> (c) ...
> (d) prescribe anything which may be prescribed under this Act.

The use of the word 'may' or 'shall' has led to some confusion in the interpretation of a provision of a statute. In ordinary usage, the word "may" is permissive, and the word 'shall' is imperative. The Courts have always construed these words with reference to the context in which it is used. In order to find out whether these words are being used in a directory or mandatory sense the intent of the legislature should be looked into along with the pertinent circumstances. If it appears to be the settled intention of the legislature to convey the sense of compulsion, then whether the word 'may' or 'shall' is used, it has the mandatory effect. Perhaps the task of the Court in interpreting these words would be solved if the Interpretation Acts 1948 and 1967 (consolidated and revised 1989) were to contain such provisions as that found in s. 37 of the Barbados Interpretation Act- Laws of Barbados Cap. 1 which states:

> 37. In an enactment passed or made after 16 June 1966, the expression 'shall' shall be construed as imperative and the expression 'may' as permissive and empowering.

The significance of such a provision in the Interpretation Act will remind the legal draftsman to always confine the use of the word 'shall' to its mandatory sense, in contrast to the use of the word 'may5 which denotes a permission or discretion.

Going back to the issue before us, it is necessary to examine the provisions of subsections (1) and (2) of s. 3 of the Act, which are:

> 3. Power to detain suspected persons.
>
> (1) Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under subsection (1) of section 6.
> (2) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect ofhim under sub section(l) of section 6:
>
> Provided that -
>
> (a) he shall not be detained for more than twenty four hours except with the authority of

a police officer of or above the rank of inspector;

(b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;

(c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him; as the case may be, shall forthwith report the same to the Minister.

These provisions give the police the power to detain an arrested person in police custody for a period not exceeding sixty days. During this period the police investigating officer must complete his investigation by examining and recording statements from, the arrested person and others acquainted with the facts and circumstances of the case, collect documents or other things material to the investigation, complete his report and submit one copy of it to the Inquiry Officer appointed under s. 5 of the Act and one to the Minister. The Inquiry Officer will then inquire if there are reasonable grounds for believing that such person has been or is associated with any activity relating to or involving the trafficking of drugs, and in carrying out this duty, the Inquiry Officer may do any or all of those things enumerated in s. 5(3) of the Act. The Inquiry Officer then prepares his report and submits it to the Minister under s. 5(4) quoted above.

The Minister's power to make a detention order is given to him by s. 6 of the Act which states:

6(1) Whenever the Minister, after considering -

(a) the complete report of investigation submitted under subsection (3) of section 3; and

(b) the report of the Inquiry Officer submitted Under subsection (4) of section 5,

is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years.

It will be seen that Parliament has fixed the time periods under s. 3(2) of the Act, but leaves it entirely to the Minister to fix the period within which the report is to be submitted under s. 3(3) and s. 5(4) of the Act. We are quite appreciative of the reasons why Parliament leaves it to the discretion of the Minister to fix the period. The Minister has to take into consideration the amount of work and time which is taken up by the Police and the Inquiry Officer to complete their investigation and inquiry. A simple and straight forward case may take a few days to complete while a complicated one may take longer.

If the Minister fixes a time period within which the police investigating officer is to submit his report under s. 3 (3) or the Inquiry Officer under s. 5(4) of the Act, that period may not be sufficient where the case will involve lengthy investigation or inquiry and this may result in the reports not being complete in the sense that matters which ought to be investigated or inquired into are left out. This will impose difficulty on the Minister to act under s. 6(1) of the Act, when deciding to make or not to make the detention order.

The time may come when the Minister, through his experience in dealing with this matter, can positively assess what should be the time period within which the police investigating officer or the Inquiry Officer can certainly complete his report, and until the Minister can come to that conclusion he should not fix the time by exercising his powers under ss. 3(3) or 5(4) of the Act. We are of the view that for the reasons given, the words "as may be prescribed by the Minister" found in both these sections ought to be treated as conferring a power to prescribe, exercisable at his discretion and not mandatory. The fact that no period has been prescribed by the Minister within which the reports are to be submitted by the investigating officer under s. 3(3) or by the Inquiry Officer under s. 5(4) of the Act does not vitiate the process leading to the detention order being made by the Minister.

Under s. 3(2) of the Act, the arrested person cannot be detained for more than 60 days without a detention order being issued by the Minister. We note that in this case the detention order was made by the Minister on the 57th day from date of arrest.

We therefore dismiss this appeal.

NORDIN BIN SALLEH

v.

KERAJAAN NEGERI KELANTAN & ANOR.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' GUNN CHIT TUAN CJ (MALAYA)
[CIVIL APPLICATION NO. 08-10-1993]
3 SEPTEMBER 1993

CONSTITUTIONAL LAW: Applicant lodged police reports against mosque official - Applicant charged with insulting mosque official - Kelantan Council of Religion and Malay Customs Enactment 1966, s. 73 - Whether Kelantan State legislature had power to enact provision - Application for declaration that Enactment invalid-Federal Constitution,Article 4(3) & (4) - Whether leave of Court necessary to commence proceedings - Whether applicant had shown an arguable case.

The applicant was served with two separate summons sent by the Chief Kadi of Kelantan charging him, pursuant to s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 (the Enactment), with insulting a mosque official because he had lodged two separate police reports against a mosque official.

The applicant sought leave, pursuant to Article 4(4) of the Federal Constitution, to file proceedings for declarations that s. 73 of the Enactment is invalid on the grounds that it makes provision with respect to a matter with respect to which the Legislature of the State of Kelantan had no power to make.

The applicant further contended that s. 73 of the Enactment is void pursuant to Article 4(1) of the Federal Constitution on the grounds that the said section is inconsistent with Article 10(1) of the Federal Constitution.

Held:

[1] The applicant had shown an arguable case in that the application was not frivolous. The Enactment is a post-Merdeka legislation and the intended challenge is on the competency of the Kelantan State Legislature to enact the legislation. The two prayers in the notice of motion are not merely grounded on the impugned law being inconsistent with the Constitution but challenges the validity of the legislation on the grounds that it deals with a matter with respect to which the State Legislature has no power to make law.